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[1-6] INDICTMENT

6251

THE STATE OF MISSISSIPPI,
Lauderdale County, ss:

In the Circuit Court of Lauderdale County, at the November Term, in the Year of Our Lord Nineteen Hundred and Sixty Six.

The Grand Jury for the State of Mississippi, taken from the body of good and lawful men of Lauderdale County, in the State of Mississippi, elected, impaneled, sworn and charged to inquire in and for said County, in the State aforesaid, in the name and by the authority of the State of Mississippi upon their oaths presents:

That JOHN DAVIS, in said County, on the 2nd day of December, A.D., 1965 did unlawfully, wilfully, feloniously, forcibly, and violently make an assault upon the person of one Mrs. E. B. Key, a female, and did then and there violently, forcibly, and feloniously rape, ravish, and carnally know her, the said E. B. Key, against her consent, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Mississippi.

George Warner, Jr., District Attorney.

[6a-19] No. 6251

INDICTMENT

Circuit Court, Lauderdale County
November Term, 1966

THE STATE OF MISSISSIPPI,

vs.

JOHN DAVIS

George Warner, Jr., Prosecutor.

A True Bill: John W. Wilson, Foreman Grand Jury.
Witnesses' Names: A. L. Willoughby.
Filed this the 15 day of Nov., 1966, Preston P. Coleman, Clerk.
Recorded 15 day of Nov., 1966, Preston P. Coleman, By: Marie Jackson, D.C. Clerk.

[20] IN THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

No. 6251

STATE OF MISSISSIPPI,

vs.

JOHN DAVIS

MOTION TO SUPPRESS EVIDENCE—Filed November 22, 1966

Comes now the defendant, John Davis, by and through his attorney, and moves the Court for an order suppressing any and all evidence obtained from the defendant when obtained without benefit of counsel and involuntarily, including any and all confessions, statements, written or oral, lie detector results, made or signed by the defendant, including any tape recordings made of such statements and confessions and all evidence relating to finger prints taken from defendant all in clear violation of the Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and would show unto the Court as follows:

1. That the defendant was arrested on three separate occasions prior to his final detention and that in each such case of arrest, the arrest was made without a warrant and without probable cause, and that all evidence obtained from defendant while he was thus illegally arrested should not be admitted in evidence against the defendant.

[21-260] 2. That all evidence obtained from the defendant, including fingerprints and confessions, were obtained at a time when defendant was without benefit of counsel.

Defendant requests that he be given an opportunity to present proof in support of the above and foregoing motion.

John Davis, Defendant, By: Jack H. Young, His Attorney.

[Tr. 260] IN THE CIRCUIT COURT OF LAUDERDALE COUNTY, MISSISSIPPI

No. 6251

STATE OF MISSISSIPPI,

v.

JOHN DAVIS

By Mr. Young:

We have a written motion here, your Honor, which I will read to the Court. Motion to Suppress Evidence. Comes now the defendant, John Davis, by and through his attorney, and moves the Court for an order suppressing any and all evidence obtained from the defendant when obtained without benefit of counsel and involuntarily, including any and all confessions, statements, written or oral, lie detector results, made or signed by the defendant, including any tape recordings made of such statements and confessions and all evidence relating to fingerprints taken from defendant all in clear violation of the Fourth, Sixth, Eighth and Fourteenth Amendments to the Constitution of the United States, and would show unto the Court as follows:

1. That the defendant was arrested on three separate occasions prior to his final detention and that in each such case of arrest, the arrest was made without a warrant and without probable cause, and that all evidence obtained from defendant while he was thus illegally arrested should not be admitted in evidence against the defendant.

2. That all evidence obtained from the defendant, including fingerprints and confessions, were obtained at a time when defendant was without benefit of counsel.

Defendant requests that he be given an opportunity to present proof in support of the above and foregoing motion. John Davis, Defendant, signed by Jack H. Young, his attorney.

[Tr. 261] By the Court:

That part of the motion that adopts other particular evidences on motions, that part of the motion is sustained. The other parts of the motion are denied and overruled at this time.

By Mr. Young:

Well, may I say this, your Honor?

By the Court:

As far as suppression is concerned, the Court feeling that they are matters that can be ruled upon substantively at the proper time and out of the presence of the jury.

By Mr. Young:

In this motion may I say to your Honor we did not adopt any proof which had heretofore been tendered.

By the Court:

That was in your ora tenis motion.

By Mr. Young:

But in this motion we feel if the Court is not going to allow us to put on proof until such time, we would like to make an offer of proof at this time, of what we would prove.

By the Court:

I will allow you to put on any such proof as you wish, so long as it is competent and relevant.

By Mr. Young:

True. Well, at this time we call Eddie Griffin.

EDDIE LEE GRIFFIN, called as a witness by the defendant to testify on the motion, was sworn, and testified as follows:

[Tr. 262] Direct examination.

By Mr. Young:

Q. Will you state your name, please?
A. Eddie L. Griffin, Jr.
Q. Where do you live, Mr. Griffin?
A. Meridian,
Q. By whom are you employed?
A. City of Meridian, Police Department.
Q. Were you so employed on December 3rd of last year?
A. I was.
Q. Did you have occasion on December 3rd last year to arrest the defendant, John Davis?
A. I did.
Q. Would you tell the Court whether or not you had a warrant for his arrest?
A. I did not.
Q. You did not have a warrant for his arrest?

By Mr. Young:

No further questions.

By Mr. Warner:

I have no questions, your Honor.

(Witness excused.)

[Tr. 263] AARON THOMPSON, called as a witness by the defendant to testify on the motion, was sworn, and testified as follows:

Direct examination.

By Mr. Young:

Q. Would you state your name, please?
A. Aaron Thompson.
Q. Where do you live, Mr. Thompson?

A. 2107 8th Avenue.

Q. By whom are you employed?

A. Police Department, Meridian, Mississippi.

Q. Were you so employed on the 3rd of December of last year?

A. I was.

Q. Do you recall having arrested the defendant John Davis on the 3rd of December last year?

A. I do.

Q. Would you state to the Court whether or not at that time you had a warrant for his arrest?

A. I did not have a warrant.

Q. You did not have a warrant for his arrest? No further questions.

Cross-examination.

By Mr. Warner:

Q. Where did you take the defendant?

A. We taken him to the City Hall.

Q. Was he confined at that time?

A. We taken him there and turned him over to the [Tr. 264] detectives for interrogation.

Q. Interrogation? Do you know what happened to him at the conclusion of the interrogation?

A. I do not.

By Mr. Warner:

No further questions.

(Witness excused.)

GEORGE BEDDINGFIELD, called as a witness by the defendant to testify on the motion, was sworn, and testified as follows:

Direct examination.

By Mr. Young:

Q. Will you state your name, please?

A. George Beddingfield.

Q. And are you a resident of Lauderdale County, Mr. Beddingfield?

A. I am.

Q. By whom are you employed?

A. City of Meridian.

Q. And what is your official position with the City of Meridian?

A. Assistant Chief of Police Department.

Q. Chief Beddingfield, do you recall an incident in December [Tr. 265] of 1965, particularly December 3rd, when the defendant John Davis was in custody?

A. I don't know. I didn't see him at that time. I don't know anything about it, not December 3rd, not at that time.

Q. Did you have occasion at any time after December 3rd to interrogate or question this defendant?

A. I was present, yes.

Q. At the time when he was first interrogated, did he have counsel with him?

A. He did not.

Q. Now, Chief Beddingfield, did you accompany the defendant, along with Mr. Keller, to Jackson?

A. I did. That was the first time I saw him.

Q. This would have been then on December 12th, would it not?

A. December 12th.

Q. Now, when you accompanied him to Jackson, was he lodged in the Hinds County jail or the City jail there?

A. I believe the City jail, that night.

Q. Let me ask you this: did you yourself ever have occasion to place him under arrest?

A. I did not.

Q. You did not? Following your taking him to Jackson, he was subsequently given a lie detector test, was he not?

A. He was.

Q. Was counsel present when the lie detector test was given?

[Tr. 266] A. His counsel? No.

Q. He had no counsel? Well, following the giving of the lie detector test, he was brought back to Meridian, Mississippi, was he not?

A. Yes, sir.

Q. At what point, if you know, was he afforded counsel?

A. I know nothing of the case, the particulars of the case that I can testify to after we got back to Meridian.

Q. Chief Beddingfield, as head of the detective bureau—you are head of the detective bureau, are you not?

A. No, I am not.

A. Are you the assistant chief?

A. I am in uniform division and I am a shift commander of the shift there, is my official duties.

By Mr. Young:

Well, no further questions of this witness.

By Mr. Warner:

No questions.

(Witness excused.)

[Tr. 267] Everett Keller, called as a witness by the defendant to testify on the motion, was sworn, and testified as follows:

Direct Examination.

By Mr. Young:

Q. Will you state your name, please?

A. Everett Keller.

Q. You are employed by whom, Mr. Keller?

A. City of Meridian, Police Department.

Q. What is your official position with the City of Meridian?

A. Juvenile Officer.

Q. And as Juvenile Officer, did you have occasion to take the defendant John Davis into custody on the 7th of December?

A. I don't know the dates, and I don't know the term custody; Voluntary custody several times.

Q. When I say "custody", did you go out to his house and pick him up? Were you along with some other officers?

A. I went to his house and talked to his mother, and I talked to him, and they agreed to talk to me.

Q. And then what did you do? Did you bring him down to City Hall?

A. I believe I did.

Q. You brought him down to the jail house?

A. Not in the jail house, no; police department.

Q. Police Department?

A. I think at that time.

Q. Did anyone else talk with him other than you?

[Tr. 268] A. I don't remember that they did.

Q. Well, you couldn't say that they did not?

A. No.

Q. Now, during the time when he was talking with you, did he have counsel with him?

A. No, he did not.

Q. Now, Mr. Keller, when you took the defendant into custody on this occasion, did you have a warrant for his arrest?

A. No warrant, no.

Q. You had no warrant for his arrest?

A. No.

Q. Now, subsequently on the 12th of December, you had occasion to take this defendant to Jackson, did you not?

A. I did.

Q. Who accompanied you?

A. Chief Beddingfield.

Q. And the defendant?

A. And the defendant.

Q. Was he placed in jail in Jackson?

A. H ewas.

Q. Now, when you picked him up on the 12th, did you have a warrant at that time for his arrest?

A. No.

Q. You did not? Now, after taking him to Jackson, did you not take him out to the Highway Patrol, where he was given a lie detector test?

A. We did.

[Tr. 269] Q. Did he have counsel present at that time?

A. No.

Q. Well, then at any time during which you had him in custody and that is, as I understand it, you picked him up on two separate occasions?

A. I picked him up more than two times.

Q. Well, when was the first time?

A. I don't remember; around the 4th of December, or probably the 5th and the 6th and 7th, along in there, about four or five times.

Q. Well, at any time when you picked him up, did you have a warrant for his arrest?

A. No.

Q. And at no time was he afforded counsel?

A. No.

Q. Is that right? That's all. No further questions.

Cross-examination.

By Mr. Warner:

Q. Mr. Keller, these times that you picked up the defendant for, I believe your words were for interrogation, or what was he picked up for?

A. I picked him up the first two or three times in an attempt to get leads on boys that were working up in this section where the crime occurred, and he gave me some names.

Q. When you say crime, are you referring to the assault on Mrs. E. B. Key?

A. That's correct.

Q. Now, you say you picked him up on several different occasions?

[Tr. 270] A. True.

Q. When you say you picked him up, did you talk to him on these occasions?

A. Oh, definitely.

Q. Were there other occasions when you talked to him at his home and did not leave his home?

A. That's true.

Q. Did you ever talk to him at any place other than his home and the City Hall?

A. Riding around and talked with him. I took him to the hospital several times. I took him up there to get a better description. I used him for a gauge to go by on size and color.

Q. Mr. Keller, during this investigation, did you also have occasion to pick up other people for questioning or interrogation?

A. Dozens.

Q. How many would you say, roughly?

A. I would say sixty-five or seventy people picked up.

Q. Picked up?

A. Talked to.

Q. Did you question some of them at the Police Station at the City Hall?

A. And some of them on the street.

Q. You say the defendant John Davis gave you names of people you could contact?

A. He gave me names of other boys who worked up in that north section, cleaning yards and doing tasks around other [Tr. 271] people's homes.

Q. Did you, in the process of your investigation of this case, did you go and contact these people and interrogate them also?

A. Certainly.

Q. I didn't get your answer?

A. Yes, sir.

Q. Were there any other people besides John Davis that you interrogated more than once?

A. Yes.

Q. Were there any other people besides John Davis that you carried to the City Hall more than once for questioning?

A. I don't know that.

Q. You don't know whether you did or not?

A. I don't know.

Q. You mentioned that you and Captain Beddingfield did take John Davis to Jackson, Mississippi?

A. Right.

Q. For a lie detector test?

A. Yes.

Q. At whose instance or request was this done?

A. I discussed it with his mother, and she seemed to feel like we were worrying him and she suggested that we take him and get it over with, was her words.

Q. Was he present when she said this?

A. Yes, he was present.

Q. After she said this, did you shortly thereafter take him to Jackson?

[Tr. 272] A. I didn't the first couple of times she would—I would suggest it to her and she would agree to it and even insist on it. I suggested it may be necessary for us to have a lie detector test and she said she would agree to it and eventually she would even insist upon it, said "get it over with".

Q. You said she said this on two or three occasions?
A. That's correct.
Q. And then finally you did take him over to Jackson?
A. True.

Re-Direct examination.

By Mr. Young:

One further question, your Honor, if I may.

Q. You stated that you took him to Jackson for a lie detector test. Now, after having been given this lie detector test, did the defendant sign any statements?
A. He signed a statement, not immediately after the test.
Q. But he did sign a statement while in Jackson?
A. Yes, he did sign a statement.
Q. Was counsel present when he signed that statement?
A. Was not.

By Mr. Young:

No further questions, your Honor.

(Witness excused.)

[Tr. 273] L. L. Scarbrough, called as a witness by the defendant to testify on the motion, was sworn, and testified as follows:

Direct examination.

By Mr. Young:

Q. Will you state your name, please?
A. Detective L. L. Scarbrough.
Q. With the Meridian Police Department?
A. That's correct.
Q. Mr. Scarbrough, as a detective in the Police Department of Meridian, do you have anything to do with finger printing?
A. Sure do.
Q. Do you recall having had an opportunity, an occasion to take this defendant's finger prints, John Davis?

A. I did.

Q. When was that?

A. I believe it was December 14th.

Q. December 14th when you took his finger prints? Now, this was while he was in custody in the Police Department, is that correct?

A. That's right.

Q. Was counsel present when you took his finger prints?

A. No.

Q. Now, do you recall when he had been arrested, when you took these finger prints?

A. No, I sure don't.

[Tr. 274] Q. Well, there has been testimony here that he was arrested on the 12th, and you took his finger prints on the 14th. The 12th would have been on Sunday. Do you recall whether or not that was the date?

A. Now, I believe that's correct.

Q. That was the day when he was arrested?

A. I believe that's right.

By Mr. Young:

No further questions.

Cross-examination.

By Mr. Warner:

Q. Mr. Scarbrough, when you say you took his finger prints, by this you mean you made an ink card or took his finger prints and put them on a regular finger print card?

A. That's right.

Q. Is this part of regular police procedure to take finger prints of a person?

A. Sure is.

Q. Now, in connection with this case, how many persons who were interrogated at the Police Department, finger prints were taken by you, or approximately, if you recall?

A. I would say it was in the neighborhood of twenty-four, because that's how many we sent off with his.

Q. In the neighborhod of twenty-four?

A. Twenty-four different people printed as suspects.

Q. In the case?

A. Yes.

Q. And all of these were taken at the City Hall, as [Tr. 275-279] far as you recall?

A. His was taken in the county.

Q. In the county?

A. Yes, sir.

Q. But they were all taken by yourself or some other member of the Police Department?

A. That's correct.

By Mr. Warner:

No further questions.

(Witness excused.)

By Mr. Young:

We have no further testimony, your Honor.

By the Court:

Let the motion be overruled. That isn't to say the Court does not reserve the right to pass upon all evidence and all testimony at the proper time in the trial of the case.

* * * * * * *

[Tr. 280] Mrs. E. B. Key, called as a witness by the State, was sworn, and testified as follows:

By the Court:

Mrs. Key, will you turn around here just a moment? Now, when the lawyers ask you questions, try and do your very best to answer them directly, without any entailed conversation, a sufficiency of what it takes to answer their questions directly. All right.

A. Thank you.

Direct examination.

By Mr. Warner:

Q. You are Mrs. E. B. Key?

A. Yes, sir.

Q. Mrs. Key, how long have you lived in Lauderdale County?

A. About forty-five years.

Q. Where did you reside? At the present time where are you living?

A. 2505 29th Street, that's where I did live.

Q. That is where your home is?

A. You mean where I am now?

Q. Yes, ma'm?

A. I am at the King's Daughters Hospital, King's Daughters Rest Home.

Q. Now, just a moment. Now, can all of you gentlemen hear Mrs. Key? Be sure you speak loud enough for each of these men to hear you. You say you are now at King's Daughters Rest [Tr. 281] Home?

A. Yes, sir.

Q. What is your age, Mrs. Key?

A. Eighty-seven.

Q. How old were you last December, please, ma'm?

A. Let's see, I was eighty-seven in August this year, and last December I was eighty-six.

Q. Now, Mrs. Key, your home, which you mentioned on 39th Street, is that correct?

A. Yes, sir.

Q. Is that where you were living last year?

A. Yes, sir.

Q. Now, I direct your attention, Mrs. Key, to the date of December 2, 1965.

A. Come up a little closer.

Q. December 2, 1965. I ask you, Mrs. Key, who lived in your home on 39th Street with you?

A. Not anyone. I was looking for a teacher though, the next day or two.

Q. You lived there alone at that time?

A. Yes, sir.

Q. How long had you lived there alone?

A. Well, at different times I had had rooms rented, but then it's been, I think, about 15 years since Dr. Key left.

Q. All right, for around 15 years you had been there, living there alone?

A. Yes, sir.

Q. Now, Mrs. Key——

[Tr. 282] A. (Interposing) When I wasn't visiting the children.

Q. You lived there when you weren't visiting the children?

A. Yes, sir.

Q. How many children did you have, Mrs. Key?

A. Three living. I am the mother of six children, and I have three living.

Q. Now, I ask you, Mrs. Key, to look at the defendant in the court room and tell me if he had ever worked for you prior to December 2, 1965? He is sitting right over here.

A. Yes, sir.

Q. All right, now on what occasions had he ever worked for you, and what type work did he do?

A. He cleaned off a vacant lot and raked some leaves.

Q. How long before December 2, 1965, did he work for you?

A. Well, it must have been a week or two.

Q. Before that time?

A. Yes, sir.

Q. On how many different occasions did he work for you? Was it only once, or was it more than once?

A. More than once.

Q. Do you remember approximately how many times?

A. No, sir; I do not.

Q. Now, by what name did you know him when he worked for you?

A. Johnny.

Q. Just Johnny?

[Tr. 283] A. The other name was a fictitious name. It was not Davis, that he told me.

Q. But you knew him by the name of Johnny?

A. Yes, sir.

Q. Was this the name that you called him at the time he was employed by you?

A. Yes, sir.

Q. Now, Mrs. Key, at your home on 39th Street, tell the jury what you see when you face the house from the front?

A. From the front porch?

Q. Yes, ma'm?

A. I see the Heritage Apartments, and Mrs. Byrd's house, and Mr. Louis Poythress' house.

Q. All right, now turn yourself around, and when you are facing your house, what do you see?

A. My front porch, two windows and two doors.

Q. Now, how many windows did you say?

A. Two.

Q. Two windows?

A. In the living room.

Q. All right, now what type covering, if any, is there on these windows?

A. Screens.

Q. Screens? All right.

A. Large screens.

Q. Now, how long prior to December 2, 1965, had it been since your screens on the front porch windows had been removed?

[Tr. 284] A. So long, I don't remember; quite a while.

Q. By that, when you say so long you don't remember, are you referring to——

A. (Interposing) I don't remember the exact time.

Q. Well, are you saying it was more than a week, or more than a year, or how long?

A. Oh, yes, longer than a year, I guess.

Q. More than a year before December 2nd?

A. Yes, sir.

Q. Since your screens had been removed for any reason?

A. Yes, sir.

Q. Now, Mrs. Key, directing your attention specifically to the date of December 2, 1965, if you will tell the jury what occurred from the time you came home late in the evening? You had been away from your home, had you not?

A. Yes, sir; I had got home about four o'clock, I think. The company went to some parade in town, and I think it was about four o'clock.

Q. All right, now after you came home, what happened?

A. Well, I went and picked up my paper and threw it on the bed and pulled off my fascinator and threw it on the bed——

Q. (Interposing) Now, just a moment—some members of the jury may not know—what is a fascinator?

A. Something you tie over your head, old fashioned fascinator. I had been cleaning out a closet and found an old fascinator, and wore it over to Mrs. Byrd's.

Q. All right.

A. And I ate supper, and went back and talked to one of [Tr. 285] my friends.

Q. Now you say you talked to a friend. Was the friend in the house?

A. No, sir

Q. How did you talk to the friend?

A. Over the phone.

Q. All right, and who was this friend?

A. Mrs. Addie Deweese.

Q. Go ahead?

A. And I told her I hoped she would have a good night's rest, and she said she hoped she would, and I turned around to get my paper—I had already eaten supper, and then somebody threw the switch and the lights went out, and somebody grabbed me around the throat.

Q. Now, just a moment, when you say the lights went out, just the lights in the room where you were?

A. No, sir; lights in the whole house. Lights in the whole house went out.

Q. All right.

A. Threw the switch and the lights in the whole house went out. Of course, at first I didn't know but what something had happened to the lights, but when somebody grabbed me around the neck then and asked if I had any money, I——

Q. (Interposing) Now, just a moment. You are demonstrating to the jury, for the record, you have your right hand at your throat?

A. Yes, sir.

Q. Is that correct, that someone——

[Tr. 286] A. (Interposing) Yes, sir; and the hand was very soft, and told me he would kill me if I hollered.

Q. And what were their words as best you can recall? You said they asked you for money. Do you remember what they said?

A. I said, "Yes, there's a little money here, five or six dollars, and you can have every penny of it, if you will just let me alone." But he did not let me alone. Pushed me back over a big chair.

Q. All right.

A. And you know the rest.

Q. No-, Mrs. Key, I will be asking you some more questions, but I want to show you first of all a photograph, and ask you if you recognize this photograph?

A. Oh, yes, sir, that was the chair.

Q. Now, what is that a photograph of, Mrs. Key?

A. Well, they call it my den, but I call it a sleeping porch. It had a bed in it, and this is the chair I sat in to read my paper, and that was the light that he knocked over when he pushed the chair back.

Q. Now, is this the room in your home where you sleep?

A. No, sir; the next room. You go into another room.

Q. But this is the chair about which you just testified?

A. Yes, sir.

Q. That you mentioned?

A. Yes, sir. And my phone, there's the chair I sat in to talk, right there. There's the phone right there by the bed.

[Tr. 287-288] Q. I ask you, Mrs. Key, if this picture is a fair representation of your sleeping parlor and the chair, about which you testified, as it was on December 2, 1965?

A. Perfect.

Q. Thank you, ma'm.

By Mr. Warner:

We offer this into evidence as Exhibit 1 to the testimony of Mrs. E. B. Key.

By the Court:

Let it go in.

(Photograph introduced into evidence, is marked Exhibit No. 1 to the testimony of the witness Mrs. E. B. Key, and is as follows:) [Omitted in Printing.]

[Tr. 289] By Mr. Warner:

Q. Before December 2, 1965, Mrs. Key, you were living in the home and looking after yourself, is that correct?

A. Yes, sir.

Q. Now, since this incident at all times after your release from the hospital, you have been living in a rest home, is that correct?

A. Yes. I lived at Al's about a week or two, until there was a vacancy up there.

Q. You said Al's. Al is your son?

A. Yes, sir.

Q. Now, Mrs. Key, back to the photograph, please, ma'm. You said the person who had their hand on your throat and was discussing money with you, I believe your words were "pushed you back into the chair", is that correct?

A. Yes, sir.

Q. Was there any conversation at that time?

A. Occasionally.

Q. Well, I want you now to——

A. (Interposing) When he would take his hand from under my chin, held that way, when he would take his hand down I would ask him a question. I asked him if there was anybody there but him, and he said there was a bunch of them out there, and they would shoot me if I hollered.

Q. All right, I ask you, Mrs. Key, if there was any violence at that time or whether or not you were injured in any way, if you recall?

A. Well, I don't know about that. I don't know what [Tr. 290] the doctor said about it. I was carried to the hospital.

Q. All right, I will cover that more in a moment. Now, Mrs. Key, I want you to tell the jury what happened. You said he pushed you back over a chair. Now tell these men what you mean by that, and what happened at that time. First of all, what did you have on?

A. The clothes I wore all day.

Q. All right, now what happened, please, ma'm?

A. Well, it's just so embarrassing, I hate to say.

Q. I realize that, Mrs. Key, but these gentlemen have to know so they can determine the facts of this case, and I need for you at this time, please, ma'm, to tell them what happened?

A. Well, he started to pushing up my clothes, and that's when I like to have died.

Q. Pushing up your clothes, and what?

A. I say that's when I like to have died. I just couldn't tell it all. I just don't remember exactly how it was.

By the Court:

Mrs. Key. Mrs. Key.

By Mr. Warner:

The Judge is talking to you, Mrs. Key.

By the Court:

I know it's quite an ordeal, but I want you to state the facts. You will have to state the facts.

A. Well, it's just so embarrassing to me.

By the Court:

Yes, ma'm. Just state the facts, please, ma'm, as con-
[Tr. 291] cisely as you can, and to the District Attorney.

A. Well, it's just like the paper stated.

By the Court:

No, we don't want to talk about the papers. We want you to state the facts, please, ma'm, to Mr. Warner.

By Mr. Warner:

Q. If you will, Mrs. Key, turn and face the jury so they can hear you and tell us, you said he was pushing up your clothes, tell us what was said by either of you, if anything, and what happened at that time?

A. Well. Well, I will have to think a minute. At one time I told him he was killing me, and then he started different. And after while, when he got up, he says, well, he asked me, there's a bed in there and did I want him to get on top. And after he had got up, he said, "Do you feel like an old lady now?" And I asked him did he want the money before he left. I says "It's in another room", and he pulled that fascinator over the flashlight he had, I suppose, because I could see his face, and I recognized him.

Q. Now, who did you recognize, Mrs. Key?

A. I recognized it was Johnny, I thought it was, but I wasn't perfectly sure right then, but then I knew nobody else had been in the house but him. I asked him to carry a table through the kitchen, where he threw the light, where the meter was.

Q. Mrs. Key, I ask you to look at the defendant and tell me when you say "Johnny", are you referring to the defendant, John Davis?

[Tr. 292] Over yonder in that white shirt, yes, sir, that's him.

Q. All right.

A. No doubt in my mind about it.

Q. All right. Now, Mrs. Key, you said——

A. (Interposing) And when he had pulled that fascinator over the flashlight, I could see his face, but he didn't know it. And I got the money. We went in there and got the money. I gave him the billfold. I had five or six dollars in it. That is every nickel I had in the house. But then if I had had money, I wouldn't have kept it in the house. I had too much sense to do that. But I didn't have but just enough to pay the hands that were working for me. And so I gave him the billfold, and he dropped the billfold outside. And, besides, he tampered with my mail, which is a penitentiary offense, as everybody knows.

Q. Mrs. Key, I want to ask you, he left at that time, did he not? He left the home?

A. Yes, sir; he went out that alley way out there.

Q. And when he left, who did you call?

A. Called Al. No, I called Fred first. No, I called the police. I tried to get them, I couldn't remember the number, that's the way it was, and then I called Fred and couldn't get him, and then I called Al.

Q. All right, now back up, Mrs. Key. I want to ask you, at the point in your testimony where you said words to this effect, "he got up and said 'you don't feel like an old woman now, do you?' ", now what had he done just prior to that time?

[Tr. 293] Well, you know what it was. I just——

Q. (Interposing) No, but I want you to tell these men on the jury right here, Mrs. Key, what had he done?

A. He had raped me.

Q. He had raped you?

A. Yes, sir.

Q. Well, you tell the jury whether or not there was any penetration of your private parts or your vagina at that time?

A. Yes, sir.

Q. Now, Mrs. Key, that night you were carried to the hospital, or shortly thereafter, were you not?

A. Yes, sir.

Q. I hand you now a photograph and ask you if you recognize this photograph, and if you do, tell me what this photograph is?

A. That scratch was where he scratched me on my face with his fingers when he tried to tie that fascinator around my neck and I jerked it off.

Q. Now, who is this photograph of, Mrs. Key?

A. That's my picture.

Q. And where were you when this photograph was taken?

A. In Rush's Hospital.

Q. I ask you if that photograph is a fair representation of you shortly after the incident on December 2, 1965?

A. Yes, sir.

Q. And the scratches to which you referred, were they on your face prior to this incident?

[Tr. 294-295] By the Court:

And where is Rush Infirmary, where is it located?

By Mr. Warner:

Q. And where is Rush Hospital? Where is it located?

A. Meridian, Missisippi. Well, it's on 14th Street, isn't it, and 19th Avenue.

Q. And, Mrs. Key, this incident occurred at your home, you said, in Meridian?

A. Yes, sir.

Q. And what county is that?

A. Lauderdale.

Q. And what state?

A. Mississippi.

By Mr. Warner:

We offer this photograph into evdence.

By the Court:

Pass that to counsel, please.

By Mr. Young:

Your Honor, we will object to introduction of this photograph unless it can be shown who made it and when and where this photograph was made.

By the Court:

I think she identified it sufficiently.

By Mr. Warner:

We offer this in evidence as Exhibit 2 to the testimony of Mrs. E. B. Key.

(Photograph introduced in evidence, is marked Exhibit No. 2 to testimony of Mrs. E. B. Key, and is as follows:) [Omitted in printing.]

[Tr. 296-297] By Mr. Warner:

Q. Mrs. Key, I show you another photograph and ask you if you know what this photograph is?

A. Yes, sir; that is another one of me, my photograph.

Q. I ask you, Mrs. Key, if you can testify where that photograph was taken?

A. Rush's Hospital.

Q. At the same time as this other photograph?

A. Yes, sir.

Q. I ask you, Mrs. Key, if that photograph is a fair representation of you shortly after the incidence on December 2, 1965?

A. It is, but I didn't know I looked that bad. I hadn't seen myself, but that's the same scratches.

Q. Now, these scratches which you have just pointed to were not on you prior to this incident?

A. No, sir.

By Mr. Young:

Your Honor, we will object to the introduction of this photograph for the same reason. The witness just testified she didn't know she looked like this.

By the Court:

That's all right, let it go in. I think it's competent. I don't imagine she did unless she looked in the mirror.

By Mr. Warner:

We offer this into evidence as Exhibit 3 to the testimony of Mrs. E. B. Key.

By the Court:

Let it go in.

[Tr. 298] By Mr. Warner:

Q. Mrs. Key, the defendant John Davis, you said you knew him by the name of Johnny and he had worked there. There is some question as to some word you said. Did you say approximately a week before this time, or approximately how long before this time?

A. Well, I tell you when he came back with that check, it was Thanksgiving Day—I remember that—a check he had gotten out of my mail box, and two dollars that Ben had sent me in a letter that I never did get, and the box was right by the steps. And that was Thanksgiving day when he brought that check back, and he said he was raking leaves over there for some lady.

Q. Mrs. Key, did you have an argument?

By Mr. Young:

Objection to leading the witness.

By the Court:

He hasn't finished his question yet.

By Mr. Warner:

Q. Was there any disagreement or misunderstanding between you and the defendant at that time?

By Mr. Young:

Same objection, your Honor.

By the Court:

Overruled.

A. Nothing only about the rake. When I told him to start

raking leaves right at the walk, and I had thought I would just have it raked to the corner, and when I went back [Tr. 299] out there, he had started in the middle and he wasn't out there. I called, and called, and called, and he didn't answer. I went to the back door and called and he didn't answer. And then next time I went out there, he was raking in the middle. I says, "Where were you when I called you?". He said he was over there at the neighbor's house, that's Louie Poythress' house. I says, "Well, what were you doing over there?" He says, "Borrowing that rake." I said, "Well, you take it right back." I says, "I don't borrow other people's tools. They don't like to lend them, and I don't blame them."

Q. All right. Mrs. Key, you pointed to a lamp in the photograph which is identified as Exhibit 1 in your testimony, and you said something about when it was knocked over. The photograph shows——

A. That is the lamp I read by, right by the chair. I had the chair—the light was right by the chair that I read my paper by before I went to bed.

Q. Now, when was it knocked over, Mrs. Key?

A. When he pushed me back that way.

Q. When he pushed you back what?

A. When he pushed that chair back, he knocked the lamp back, and I think that was knocked over too, that's an ash tray, but this was the lamp I read by and it was pushed over.

By Mr. Warner:

Your witness.

Cross-examination.

By Mr. Young:

Q. Mrs. Key, I know this is embarrassing to you and it [Tr. 300] is embarrassing to me also, but I have to ask you a few question, please, ma'm. Now, what time was this when this incident happened at your house?

A. I don't remember the exact time. I think it must have been a little after dark.

Q. But it was dark?

A. Yes.

Q. Would you say then it was about six or seven o'clock?

A. Well, I just don't know the exact time because it was right after I came back from Mrs. Byrd's, and I ate supper, and then I went and got my paper just outside the door and talked to this friend, and turned around to read my paper, and that's when it happened.

Q. That's when it happened?

A. And I don't know the exact time. I just couldn't swear to that.

Q. Was it dark in your house?

A. It wasn't until he cut the lights out, when he threw the switch then the whole house was dark.

Q. The whole house was dark?

A. Yes.

Q. And you couldn't see him because it was dark in the house, is that correct?

A. Not right at that time, but I could later on when he turned on his flashlight and pulled that fascinator over it. I could see his face.

Q. Did he have a flashlight?

A. Yes, sir.

[Tr. 301] Q. Do you know what hand he had the flashlight in, Mrs. Key?

A. What?

Q. Do you know what hand he had the flashlight in?

A. No, I don't. It must have been his left hand because he used his left hand to hold my chin up to keep me from hollering. He said if I hollered that he would kill me. Asked me if I had a pistol.

Q. Now, Mrs. Key, do you recall whether he put the flashlight down on something and then put the fascinator around your neck, or whether he kept the flashlight in his hand?

A. I just don't know how he managed it, but he tried to tie it around my neck and I jerked it off. Then he tried to tie it around my mouth, and I jerked it off. Then he put his hand under my chin, said if I hollered they would shoot me.

Q. Well, now then how soon after he had gone before you called someone?

A. Just as quick as I could get to the phone.

Q. And whom did you call, Mrs. Key?

A. I wanted to—I started to call the police, but I couldn't

remember their number, and I called Fred and didn't get him, and then I called my boy Al, and Evelyn, and they were down there in a little while. He confessed it all.

Q. Mrs. Key, where is this light switch in your house?

A. In my kitchen, right by the door going into the dining room.

Q. And this would be how far from the bedroom where you were?

[Tr. 302] A. No, it's in the kitchen, and he went through the kitchen when he carried that table up to the guest room, where the teacher was going to stay, and he was the only one had been in the house.

Q. Then is it your statement then because he was the only one who had been in your house, you thought it was him?

A. Except the girl who helped me.

By Mr. Young:

No further questions.

A. And he confessed it all.

By the Court:

Mrs. Key, just don't talk unless somebody is asking you questions.

A. What?

By the Court:

Don't talk unless somebody is asking you questions. Gentlemen, whatever you heard Mrs. Key say there at this particular moment, you won't consider that at all. Let it go out of your minds.

Re-Direct examination.

By Mr. Warner:

Q. Mrs. Key, when counsel was questioning you about which hand the flashlight was in——

A. (Interposing) I don't know.

Q. Your answer was you don't know which hand the flashlight was in.

A. It must have been in his left hand though, because

he had the other one under my chin to keep me from holler-
[Tr. 303-307] ing. I tried to pray and he wouldn't let me.

Q. But, by the light of the flashlight, could you see his face?

A. Yes, sir. True, he had that fascinator over it, and I could see through that crocheted part, his face, and I recognized him or at least I thought that's who it was. I was pretty sure it was.

By Mr. Warner:

Thank you, ma'm. We have no further questions.

By Mr. Young:

We have no questions.

By Mr. Warner:

If the Court please we ask that Mrs. Key be finally excused.

By Mr. Young:

We have no objection, your Honor.

(Witness excused.)

[Tr. 308] L. A. Willoughby, called as a witness by the State, was sworn, and testified as follows:

Direct examination.

By Mr. Warner:

Q. You are Detective L. A. Willoughby?

A. Yes, sir.

Q. Detective Willoughby, I presume you are a Detective at the Meridian Police Department?

A. I am.

Q. How long have you been with the Meridian Police Department?

A. Nineteen years.

Q. What is your official capacity with the Police Department?

A. Identification Bureau, Identification Officer.

Q. With the Detective Bureau? I direct your attention to the date of December 2, 1965——

By Mr. Young: (Interposing)

Your Honor, I have an objection I would like to make out of the presence of the jury.

(At this point the jury retire from the presence of the Court, and the following proceedings were had and done in the absence of and out of the hearing of the jury:)

By Mr. Young:

May it please the Court the defendant at this time would renew its motion to suppress the evidence, including any finger prints which may or may not have been taken after [Tr. 309] the defendant was arrested, and specifically objects to any testimony by this witness relative to any finger prints of the defendant which were taken subsequent to his arrest on December the 3rd, because the evidence shows up to this point that he was arrested without warrant, that his finger prints were taken when he was deprived or had not the benefit of counsel, and we respectfully submit that any evidence procured under these circumstances under Mapp v. Ohio is illegal.

By the Court:

Now the Court is pre-supposing that would be the nature or the quality of the testimony that would flow from this witness, is that correct, Mr. Warner?

By Mr. Warner:

Not entirely, your Honor.

By the Court:

Would you like to make your record on examination?

By Mr. Warner:

I would just simply state to the Court that this witness and the witness to follow him together will testify con-

cerning finger prints taken from the defendant John Davis while in custody.

By the Court:

Well, the motion is to suppress, so I will overrule the motion. Bring the jury in.

(At this point the jury returned into open court, and the following proceedings were had and done in the presence of and within the hearing of the jury:)

[Tr. 310] By Mr. Warner:

Q. Mr. Willoughby, directing your attention to December 2, 1965, I ask you if you were on duty that day?

A. I was on duty that—no, sir; I wasn't. I was called to duty, extra duty.

Q. Called to duty?

A. Yes, sir.

Q. I assume then you were off duty?

A. Yes, sir.

Q. Where were you when you received a call to report to duty?

A. Home.

Q. At home, and to what place did you proceed as a result of the telephone call or information relayed to you?

A. I came to the City Hall and then proceeded to the Key home.

Q. Now, you say the Key home: what Key home?

A. Mrs. E. B. Key.

Q. Do you know the approximate time of day or night that you arrived at the Key home?

A. Oh, approximately seven o'clock.

Q. That is your best judgment? Could it be more or less?

A. Could be a few minutes either way.

Q. Now, when you arrived at the Key home, Detective Willoughby, I ask you if there was anything that attracted your attention concerning the front of the home?

A. Yes, sir. Detective Scarbrough was processing a [Tr. 311] window, the right front window on the front of the house, for finger prints and I began to help him.

Q. Was he processing the window on the inside of the house or on the outside of the house?

A. Outside.

Q. I assume then the screen was removed?

A. Yes, sir.

Q. So the screen was not there when you got there?

A. The screen was on the porch, but it was not on the window.

Q. And what did you say you did with Detective Scarbrough?

A. I aided him in checking this window for latent finger prints.

Q. Now, in your process, tell us whether or not you found any latent finger prints?

A. On the outside of the glass, we found two partial prints, and on the inside of the window—the window was up partially—inside on the window sill we found a part of a thumb print.

Q. What did you do as a result of finding these prints, what did you do?

A. We lifted the prints off of the window.

Q. Now, sometime thereafter, did you have any occasion to do anything with these prints?

A. I sent them to the FBI in Washington.

Q. You did this yourself?

A. Yes, sir.

Q. When you say you sent the prints, what did you send [Tr. 312] the FBI?

A. I sent those latent prints, plus 24 cards, inked cards.

Q. These 24 cards, were they all of the same person?

A. Different persons, every one of them.

Q. And what did these 24 cards represent? Who were these prints of?

A. More or less suspects that we had talked to and questioned.

Q. In connection with this case?

A. Yes, sir.

Q. Now, you stated, Detective Willoughby, that you had been with the Police Department for nineteen years?

A. Yes, sir.

Q. How long have you been in the Detective Bureau?

A. Seventeen.

Q. And during these seventeen years, tell the jury how much experience or your experience and qualifications in connection with finger prints?

A. Well, that seventeen years is practically in constant finger print work.

Q. When you say finger print work, what do you mean by finger print work?

A. That means dusting the crime scene for latent finger prints, ink prints and all, classifying and filing, everything.

Q. You used a term "ink prints". What do you mean by this, and what has been your experience in connection with this, if any?

[Tr. 313] A. I have made thousands of those.

Q. What is an ink print?

A. That is where your put ink on the finger and roll it on the card.

Q. And you have made how many of them?

Q. Thousands of them.

Q. Have you had any schooling or training by anybody or any organization in this work and, if so, who and when?

A. The FBI, in 1952.

Q. Then you have already testified to your practical experience, have you had any other schooling or training in connection with this job?

A. No, other than regular in-service training in our own department.

Q. This is the only formal training you have had in connection with police work—I mean finger printing?

A. Yes, sir.

Q. Where did the FBI training take place?

A. Washington.

Q. Whereabouts in Washington?

A. The Identification Division.

Q. And how long was this training?

A. Three months.

By Mr. Warner:

Your witness.

By Mr. Young:

No questions, your Honor.

By Mr. Warner:

Your Honor, I would like to ask him a couple other [Tr. 314] questions.

By the Court:

All right, sir.

By Mr. Warner:

Q. Mr. Willoughby?

A. Yes, sir.

Q. I hand you two cards I believe are referred to as ink print cards, and ask you if you recognize these cards?

A. Yes, sir.

Q. I ask you if these cards are two of the 24 cards you said you sent to the FBI?

A. Yes, sir.

Q. I hand you 4 items, and ask you if you can identify them as to what they are?

A. This is a latent print that came off of the window, and this is the thumb print.

Q. And what is this one?

A. I don't remember what that one is. It could be a second or third left of this thumb print here.

By the Court:

You gentlemen in the back there, can you hear this testimony all right and plainly? Now, if you don't hear it, I want you to raise your hands, any one of you, please.

By Mr. Warner:

Q. I ask you, Detective Willoughby, if these four latent prints you have pointed to are the latent prints you testified you sent to the FBI Laboratory?

A. Yes, sir.

[Tr. 315-319] By Mr. Warner:

We offer these into evidence as exhibits.

By the Court:

Have they been properly identified as to whose prints they are?

By Mr. Warner:

No, sir; I am going to do that in a moment, your Honor.

We offer these into evidence as Exhibits 1, 2, 3, 4, 5 and 6 to the testimony of Detective Willoughby.

By the Court:

Unless there is objection, let them go in.

By Mr. Young:

We have the same objection, your Honor, that we made out of the presence of the jury. We object to this.

By the Court:

All right, overruled.

(Items introduced in evidence are marked Exhibits 1, 2, 3, 4, 5, and 6 to the testimony of the witness L. A. Willoughby, and are as follows:) [Omitted in printing.]

[Tr. 320] By the Court:

Now, you understand, Mr. Warner, you introduced this particular evidence and identified it only as finger prints.

By Mr. Warner:

Yes, sir; I identified it, your Honor, as the prints that he testified he sent to the FBI Laboratory, that is correct.

By the Court:

It does not identify the personality of the prints itself?

By Mr. Warner:

That's correct. That's correct.

By the Court:

Q. All right.

By Mr. Warner:

That's all.

Cross-examination.

By Mr. Young:

Q. Mr. Willoughby, I believe you said that you had been

with the Identification Department of the Meridian Police for some sixteen or seventeen years?

A. Yes, sir.

Q. Has your work been devoted exclusively to identification or to general police work?

A. To identification.

Q. That's all you do?

A. Yes, sir.

[Tr. 321] Q. Now, are you the head of the Division?

A. No, sir.

Q. Who is the head of the Identification Bureau?

A. Chief Powell.

Q. And you work under his supervision?

A. Uh-huh.

Q. Now, I believe you said when you got to the home of Mrs. Key on the evening of December 2nd, that someone was already in the process of taking these finger prints, is that correct?

A. That's right.

Q. And who was that?

A. Detective Scarbrough.

Q. And you said he took one print off the window?

A. Yes.

Q. Did he take one off any place else?

A. Off the window sill.

Q. Off the window sill? Now, was the screen in or out of the window when you came there?

A. It was out.

Q. It was out of the window? Did you dust the screen for finger prints?

A. I don't remember whether we did or not. I think we looked at it and decided not to.

Q. Why?

A. It was just old painted wood.

Q. And finger prints won't take on old painted wood?

A. Not very good.

[Tr. 322] Q. Well, if it were dusty, wouldn't finger prints show on it?

A. It is doubtful.

Q. Now, this was on December 2nd, correct?

A. That's right.

Q. And I believe you said that you sent these—I believe

they call them latent finger prints—along with a number of other ink copies to the FBI Laboratory, correct?

A. I did.

Q. Now, when did you send them?

A. December 14th.

Q. You sent them on the 14th? Now, one further question: do you have facilities in your office which permits you to compare latent finger prints with finger prints you have on file in your office?

A. No, sir.

Q. All of your finger prints then have to be sent to the FBI then for identification?

A. Only what we would do just take it on ourselves to do ourselves.

Q. So then for positive identification you send all finger prints to the FBI Laboratory, is that right?

A. Yes, sir.

Q. Now, at the time that these finger prints were taken, the Meridian Police Department hadn't definitely decided on a suspect, had they? This is on December 2nd?

A. No, sir.

Q. Right. Now, you say that on December 14th, you sent some 24 prints off, that correct?

[Tr. 323] That's right.

Q. When did you take these prints?

A. From the 2nd on to the 14th.

Q. From the 2nd on to the 14th? These were prints of people that you had arrested from time to time on investigation? Is that right?

A. That's right.

Q. O.K. Now, let me ask you this, Mr. Willoughby; why did you wait until the 14th? You were trying to catch a criminal, somebody who had committed a very heinous crime, and you knew that the only positive way you could get for identification was to send these prints to the FBI Laboratory. Why did you wait from the 2nd to the 14th to send these prints to the laboratory?

A. Oh, we was busy folks along about that time.

Q. But you were busy trying to get the criminal, weren't you?

A. That's right.

Q. Well, now, isn't it accepted procedure as soon as you get prints in a case like this to send them off to the FBI Laboratory?

A. We do.

Q. How do you account for the fact you didn't send them this time?

A. Like I said, we was busy, and instead of sending part today and part tomorrow—they like to get them all at one time.

Q. So you elected then to take prints from the 2nd to the 14th, and you waited until the 14th to send them off, is [Tr. 324] that right?

A. Not necessarily. Some of them might not been took until after the 10th, or 9th, or 8th, or something like that.

Q. Well, the fact remains, you didn't send off any prints, either the latent prints or the ink prints, until the 14th? Is that right?

A. That's right.

Q. And that's accepted police procedure as a whole?

A. Not necessarily.

By Mr. Young:

No further questions.

(Witness excused.)

[Tr. 325] L. L. SCARBROUGH, called as a witness by the State, was sworn, and testified as follows:

Direct examination.

By Mr. Warner:

Q. You are L. L. Scarbrough?

A. That's correct.

Q. You are a member of the Meridian Detective Bureau?

A. Right.

Q. Police Department, City of Meridian?

A. Yes, sir.

Q. How long you been on the Police Department?

A. Seventeen years.

Q. How long you been in the Detective Bureau?

A. Twelve.

Q. Have you had any experience in this twelve years Detective Bureau in finger print work?

A. I sure have.

Q. Have you had any formal training in finger print work?

A. Sure have.

Q. What type training and where did it take place?

A. Well, the first was at the University of Louisville, Kentucky, Southern Police Institute. The second was the FBI National Academy in Washington.

Q. How long were you in Louisville, Kentucky?

A. Three months.

Q. And how long ago was this?

[Tr. 326] A. In 1953.

Q. All right, when did you go to the National Academy, the FBI Academy?

A. In 1959.

Q. How long were you there?

A. Three months.

Q. How much training did you receive during these two schools in connection with finger print work?

A. Well, we worked in latent finger prints, and also they taught us to classify, for filing purposes.

Q. How much practical on the job experience have you had in connection with finger prints with your duties as a detective with the Meridian Police Department?

A. Well, twelve years that I have been in the Detective Bureau.

Q. Well, what practical experience have you had, of what has it consisted?

A. Lifting latent prints, latent finger prints, classifying them and filing them.

Q. Well, what about ink prints?

A. We finger print every subject that comes through the Detective Bureau at the present.

Q. In this twelve year period, in your best judgment, how many finger prints have you made?

A. I wouldn't have any idea.

Q. Would you say more than fifty?

A. If I had to say roughly, I would say five thousand.

Q. Five thousand? How much experience have you had [Tr. 327] in lifting latent prints?

A. Well, on nearly every call we have, where it's a burglary or a felony, or a case like that, we always search for latent finger prints, crime scene search.

Q. Have you lifted prints throughout your experience as a detective?

A. I have.

Q. What is the normal police procedure in connection with these latent finger prints? What do you do with them?

A. Well, we have a latent finger print file. We file them and when we come up with a suspect, we try to compare them with the suspect.

Q. Do you ever have any other assistance comparing these latents with finger prints?

A. We do. We send them to the FBI Identification Division.

Q. Now, Mr. Scarbrough, I direct your attention to the date of December 2, 1965, and ask you on that date if you assisted in the investigation of the case now being tried?

A. Yes, sir; I did.

Q. Where is the first place you went in connection with this case?

A. Went to Mrs. E. B. Key's home at 2505 39th Street.

Q. When you arrived at her home, if you can recall, tell the jury what the front end of her house looks like, viewing it from the front?

A. Well, it's a window on each side of the door, on the right and the left.

[Tr. 328] Q. Now, asking you about these windows, when you arrived at the home, what was the condition of these windows?

A. The window on the right was in a half raised position and the screen had been removed.

Q. Now, what did you proceed to do in connection with this window?

A. We processed it for finger prints.

Q. Did any pesron assist you in this processing?

A. Detective Willoughby was with me.

Q. In connection with processing of this window, I ask you whether or not you found any latent prints?

A. We did.

Q. Now, I hand you a photograph, Mr. Scarbrough, and ask you if you can identify the scene depicted in this photograph?

A. This is the window that we processed.

By Mr. Young:

Your Honor may we see this?

By the Court:

I think he should show it to you first. Mr. Warner, pass it over there to him, please.

By Mr. Warner:

Q. Now, what was your answer? This is what?
A. This is the window that we processed.
Q. I ask you, Detective Scarbrough, if this window is a fair representation of the window about which you have been testifying on the front of Mrs. Key's home on December 2, 1965?
A. It is.

[Tr. 329-330] By Mr. Warner:

We offer to introduce this picture into evidence as Exhibit 1 to the testimony of Detective Scarbrough.

By Mr. Young:

To which we object. There has been no proof that that is the same picture, that same window, your Honor.
I think you can qualify it a little better, Mr. Warner, with reference to the time element, and so forth and so forth.

By Mr. Warner:

Q. Mr. Scarbrough, do you know when this picture was taken?
A. It was taken the following morning.
Q. And this is a photograph of which window?
A. This is on the right-hand side of the porch, front porch, front of the house.
Q. Is this the window on which you found latent finger prints?
A. It is.

By the Court:

I think that's sufficient.

(Photograph introduced in evidence, is marked Exhibit No. 1 to the testimony of the witness L. L. Scarbrough, and is as follows:) [Omitted in printing.]

[Tr. 331] By Mr. Warner:

Q. Mr. Scarbrough, how many latent prints did you find on or about this window?

A. We found two on the glass window.

Q. Two on the glass window?

A. Yes.

Q. Did you find any others?

A. We found a palm print on the sill inside.

Q. Now, Mr. Scarbrough, I will ask you, if you will, to come over in front of the jury and show the jury where on the window you found the latent prints about which you have been testifying?

A. They were right in the left-hand corner here, right in this area.

Q. These latent prints about which you are testifying there, were they on the inside of the house or on the outside of the house?

A. On the outside of the house.

Q. Would they be then between the screen and the window?

A. That is correct.

Q. Now show them where the palm print about which you have testified was located?

A. The palm print was taken from inside the window, on the sill.

Q. Each member of the jury see this? (Witness resumes the stand.) Mr. Scarbrough, I hand you four latent prints marked for identification as Exhibits 3, 4, 5, and 6 to the testimony of L. A. Willoughby, and ask you if you recognize or can identify these latent prints, and if so, what they are?

[Tr. 332] A. This is a finger print that we obtained from the outside glass.

By Mr. Warner:

Just a moment. The witness is identifying Exhibit 6 to the testimony of L. A. Willoughby.

A. This is also.

Q. Speak up as to this one. What did you say?

A. This one is too. This one was lifted from the outside glass on the window.

Q. The one you are holding is identified by the reporter as Exhibit 3 to the testimony of L. A. Willoughby.

A. These two are palm prints that was lifted from the sill inside the window.

Q. Now, the two you are holding are identified as Exhibits 5 and 4 to the testimony of L. A. Willoughby? Is that correct?

A. That is correct.

Q. You personally made these lifts?

A. Yes, sir.

Q. Now, Mr. Scarbrough, I hand you an item which has been marked as Exhibit 1 to the testimony of L. A. Willoughby, and ask you if you can identify this?

A. Yes, sir; I took these prints on December 14, 1965, of John Davis.

By Mr. Young:

Just a minute. Your Honor please Mr. Willoughby didn't testify anything about those prints, did he?

By Mr. Warner:

I didn't hear you.

[Tr. 333] By Mr. Young:

Mr. Willoughby testify with regard to those?

By Mr. Warner:

Mr. Willoughby identified these as being prints which he mailed to the FBI Laboratory.

By Mr. Young:

Oh, I am sorry.

A. These are prints of both of his hands, right and left.

By Mr. Young:

Objection, your Honor.

By the Court:

Overruled.

By Mr. Warner:

Q. Of both of whose hands?

A. John Davis.

Q. Now, is John Davis in the court room, please? Point to him.

A. (Indicating)

Q. All right, and you made this ink card on what date?

A. December 14, 1965.

Q. Did you make this yourself?

A. I did.

Q. I hand you another item and ask you if you can identify this item?

A. Yes, this is prints of his hand and fingers, made on the same day, December 14, 1965.

Q. When you say "his," to whom are you referring?

[Tr. 334] A. John Davis.

Q. Now, the object which you hold in your hand is an ink palm print, is that correct?

A. That is correct.

Q. By whom was this made?

A. By myself.

Q. All right, and this is identified by the reporter as Exhibit 2 to the testimony of L. A. Willoughby, is that correct?

A. That is correct.

By Mr. Warner:

Your witness.

Cross-examination.

By Mr. Young:

Q. Mr. Scarbrough, at what time did you get to Mrs. Key's house?

A. I imagine around 7:30 approximately.

Q. Well, now, there has been some testimony here to the effect that you might have been there earlier, so could you be mistaken as to the time?

A. I could be, but I would say roughly 7:00 or 7:30.

Q. 7:00 or 7:30? It was dark?

A. It was.

Q. Now, when you got there you proceeded to take the finger prints or dust for finger prints, is that right?

A. Correct.

Q. Did you dust the screen for finger prints?

A. I did not.

[Tr. 335] Q. Why?

A. Rough, too porous.

Q. But you can't take finger prints off of rough, porous surfaces?

A Correct.

Q. Then, you did dust the window, for finger prints, is that correct?

A. Correct.

Q. Now, I believe you said that this picture was taken the next day, is that correct?

A. Yes.

Q. Do you know who took the picture?

A. Detective Willoughby.

Q. Were you present when he took the picture?

A. I was.

Q. Now, when you arrived at Mrs. Key's home, is this the position in which you found this window?

A. The window was in a half raised position.

Q. So this actually doesn't represent a true picture of the way this window was, does it?

A. It doesn't? It does, yes.

Q. And this all occurred, I mean the lifting of the prints occurred on the 2nd of December, correct?

A. That's correct.

Q. Now, I believe you testified that these finger prints which you allege were taken from the defendant were made on the 14th of December, is that correct?

A. That is correct.

Q. Both of them were made on the 14th of December, is [Tr. 336] that correct?

A. That is correct.

Q. Now, when were these prints sent to the FBI Laboratory?

A. On that day.

Q. On the 14th of December?

A. Detective Willoughby sent them.

Q. On the 14th of December, correct?

A. I believe that is correct.

Q. Same day you made these prints?

A. I believe that's correct.

Q. And it is also correct that that is the same day on which you sent the latent finger prints, is that correct?

A. Correct.

Q. O.K. Now, Mr. Scarbrough, Detective Willoughby testified that these prints were sent along with some 24 other sets of prints, is that correct?

A. That's correct.

Q. Now, when were these 24 prints taken?

A. During the course of the investigation.

Q. Well, now, is it not true then, Mr. Scarbrough, that you picked up a number of young negro boys in investigating this matter, is that not true?

A. That's correct.

Q. And when you picked them up, you finger printed all of them?

A. That's correct.

Q. By the same token you finger printed the defendant here before December 14th, didn't you?

[Tr. 337] A. That's correct.

Q. In other words you had his finger prints the first time you arrested him, didn't you?

Q. He was finger printed the first time on December 3rd, but not by me.

Q. But he was finger printed on December 3rd, is that right?

A. That is right.

Q. And on December 3rd you also had the latent finger prints?

A. That's correct.

By the Court:

Let him finish his answer before you ask the next question.

By Mr. Young:

I am sorry, sir.

Q. And you had his latent finger prints on December 3rd, did you not?

A. That is correct.

Q. Now, how does it happen then that you come and

testify that the prints that you sent to the FBI Laboratory, you waited until December 14th to take them?

A. Well, we was processing them as fast as we could, as far as picking them up, printing them, checking them.

Q. But you had some prints of his which could have been sent to the FBI Laboratory as early as December 3rd, did you not?

A. Detective Willoughby did.

[Tr. 338] Q. But in possession of the Police Department?

A. That's right.

Q. And you also had the latent finger prints in the possession of the Police Department?

A. That is correct.

Q. Now, this was a very, very heinous crime, a very regretful thing, and the police were putting forth every effort to find the culprit?

A. True.

Q. Why did you wait to send the finger prints off if you were trying to find him?

A. Well, during the course of investigation, Detective Willoughby was checking them as fast as he could.

Q. Now, Mr. Scarbrough, do you recall when this defendant was taken over to Jackson on the 12th?

A. I remember.

Q. You recall when he was brought back?

A. I do.

Q. On the following day? Now, when he was brought back, was he not taken to Mrs. Key's house?

A. He was.

Q. He was? Was he taken on the front porch of Mrs. Key's house?

A. He was.

Q. He was also carried inside Mrs. Key's house, was he not?

A. Right.

Q. Did he touch anything?

[Tr. 339-352] A. Not to my knowledge.

Q. You can't say as a positive fact that he didn't touch anything, can you?

A. I am sure he might have touched something, but I didn't notice it.

Q. Now, one thing further, Mr. Scarbrough, during the investigation of this crime, did you employ police dogs or blood hounds, or anything?

A. Right after the crime, we did have a blood hound.
Q. Where did you get the blood hound from?
A. The Sheriff's Department.

By the Court:

Mr. Young, I want the witnesses to be able to finish their answers.

By Mr. Young:

Pardon me, your Honor. Go right ahead.

A. The Sheriff's Department furnished a blood hound.
Q. The Sheriff's Department of this County has a blood hound?
A. That's right.
Q. You know where the blood hound went when he went to Mrs. Key's house?
A. I was processing the window. I didn't go with the dog.
Q. You did not go with the dog? Mr. Scarbrough, do you have any idea how far it is from Mrs. Key's house to the defendant's house?
A. I would say roughly two and a half miles.

By Mr. Young:

No further questions, your Honor.

(Witness excused.)

[Tr. 353] By Mr. Young:

We have a motion, your Honor.

By the Court:

Take the jury out.

(At this point the jury retire from open court, and the following proceedings were had and done in the absence of and out of the hearing of the jury:)

By Mr. Young:

Comes now the defendant and moves the Court for a directed verdict and assigns as reasons therefor the following: that to convict this defendant on a record such as this,

which is barren of evidence of guilt of the defendant, would be to deny the defendant due process and equal protection of the laws as guaranteed by the 14th Amendment of the Constitution of the United States and by the Constitution of the State of Mississippi.

And further assigns as reason therefor, that the evidence introduced by the State in support of its case, was illegally obtained and obtained at a time when defendant was without counsel.

By the Court:

The Court has re-examined the Mapp case, but the Court does find there is sufficient material here, even in the face of examination the Court made, to warrant a jury finding. There are some elements evidenciary in nature in the case that will bear some considerable close inspection, but under the rules of the laws of the State of Mississippi this Court feels that the State has made a case and that the case should go to [Tr. 354] the jury at this point. Overruled.

(At this point the jury return into open court, and the following proceedings were had and done in the presence of and within the hearing of the jury:)

Whereupon, the State having rested and motion by defendant for directed verdict having been overruled, the Defendant then and there, to maintain the issues on his part, offered and introduced the following testimony, to-wit:

Everett Keller, called as a witness by the defendant, was sworn, and testified as follows:

Direct examination.

By Mr. Young:

Q. Will you state your name, please?
A. Everett Keller.
Q. Are you employed by the Meridian Police Department, are you?
A. I am.
Q. In what capacity?
A. Juvenile Officer.

Q. How long have you been such an officer?

A. Around eleven years.

Q. Mr. Keller, did you have occasion during the month of December of last year to arrest the defendant, John Davis?

[Tr. 355] A. I did.

Q. Did you have occasion to take the defendant to the hospital where Mrs. Key was confined?

A. Yes, I did.

Q. Did you take him in the room where Mrs. Key was?

A. Yes.

Q. Did Mrs. Key identify him?

A. Not positively.

By Mr. Young:

No further questions.

Cross-examination.

By Mr. Warner:

Q. Mr. Keller, did you say that Mrs. Key did not identify the defendant at the hospital?

A. That's right.

Q. Where was Mrs. Key at the time this identification process took place?

A. In her room at the hospital.

Q. Where was the defendant John Davis at that time?

A. He was standing in a corner of the room.

Q. Now, in a corner of the room, approximately how far from Mrs. Key? Would you point to something in the court room?

A. About five foot.

Q. About five?

A. Yes, about from my knee to the table there.

Q. From your table to the table where?

A. Well, that table is about five and a half foot, I [Tr. 356-389] would say five foot, five and a half.

Q. Now, how as the defendant dressed at that time?

A. White pants and white tennis shoes.

Q. Did Mrs. Key make any comment concerning his clothing?

A. I took him back out and then talked to her, and she said that he had on pants like that, white corded denim.

Q. Do you remember the date that this was?
A. No, I don't.
Q. Now, what was Mrs. Key's condition at this time?
A. I would say that she was in a highly nervous state.

By Mr. Warner:

No further questions.

By Mr. Young:

No further questions.

(Witness excused.)

[Tr. 390-401] We, the Jury, find the defendant guilty as charged and fix his punishment at imprisonment in the State penitentiary for life.

Filed Nov. 22, 1966, Preston P. Coleman, Circuit Clerk.

IN THE SUPREME COURT OF MISSISSIPPI

No. 44,501

JOHN DAVIS,

v.

STATE OF MISSISSIPPI

SMITH, Justice:

Appellant, John Davis, was convicted of the crime of rape in the Circuit Court of Lauderdale County and was sentenced to life imprisonment in keeping with the verdict of the jury. From that conviction and sentence, he has appealed here.

On December 2, 1965, in the City of Meridian, in the early hours of the night, an eighty-six year old white woman was raped in her home by a negro youth.

At the May 1966 Term of the Circuit Court of Lauderdale County, Appellant, John Davis, was indicted for the crime. However, the question having been raised that there had been a systematic exclusion of negroes from jury service in Lauderdale County and the trial court so finding, all indictments, including that against Appellant Davis, were quashed, the jury box emptied and the Board of Supervisors directed by the trial court to refill the box by drawing the names of 1500 qualified persons for jury service. This having been done, a new grand jury was constituted at the November 1966 Term, and Appellant Davis was again indicted for the offense.

Motions to quash the grand jury panel and the second indictment were substantially similar to motions in other cases tried at the same term, including *Boyd* v. *State*, No. 44,502 (Miss. Nov. 6, 1967). By stipulation of counsel, transcripts of the evidence adduced upon the hearing of the motions were used in each of these cases. The opinion in *Boyd*, by Justice Brady, therefore applies with equal force to the motion here. The motion in this case was properly overruled for the reasons stated in *Boyd*.

Nor does the record support appellant's objection that negroes were systematically excluded from the 75 man

special venire from which the trial jury was selected. Two negroes actually served on the jury and seven or eight others were placed in the box, but excused upon peremptory challenge.

Appellant assigns and argues several grounds for reversal.

The fact of rape was established beyond dispute and is not questioned on this appeal. Appellant did not testify. His defense was an alibi, sought to be established by the testimony of two witnesses which tended to show that he was elsewhere when the crime was committed.

The countervailing evidence for the prosecution, identifying appellant as the assailant, consisted of the victim's own testimony that she recognized him, and of finger and palm prints lifted by the police from the window and window sill where the attacker had gained entrance to her home, and identified by the Federal Bureau of Investigation as being those of appellant.

Appellant's first contention is that he is entitled to a reversal of his conviction because he was denied a public trial. The circumstances upon which this argument is based follow.

When the case was called for trial, the first witness for the prosecution was the victim, an eighty-seven year old woman. Of its own motion, the court directed that, during the course of her testimony only, the public would be excluded from the courtroom. The court made it clear that, upon the conclusion of the testimony of this witness, everyone might return and remain throughout the trial. The appellant made no request that relatives be allowed to remain, or that the court make any other exception to the exclusionary order.

Following the court's announcement, this colloquy took place between appellant's counsel and the court:

By Mr. Young:

> Your Honor, I understand and appreciate the Court's reason for excluding the general public from the court room during the testimony of (naming the witness); but under the circumstances I am going to have to enter an objection for the record, your Honor. I think this would deprive the defendant of a public trial that

is guaranteed to him by the Constitution, and we just want this entered in the record.

By the Court:

All right. The Court makes this order in order to keep down unnecessary publicity, unnecessary embarrassment, and it believes it is in keeping with the best conduct of a case of this sort, and particularly the, sometimes, ugly curiosity that comes into cases of this sort as far as the public is concerned. The Court does not exclude the public from this trial beyond the testimony of (naming the witness), who is eighty-seven years of age, and a woman considerably known throughout this part of Mississippi.

All right.

The trial then proceeded. After the conviction and sentencing of appellant, appellant moved for a new trial, assigning a number of grounds, but the action of the court in excluding the public during the testimony of the victim was not among them. Nor was it asserted in the motion that the defense had been prejudiced by the exclusion of the public during the victim's testimony.

The action of the court in this regard was an exercise of discretion vested in it under the Mississippi Constitution 1890 section 26, which provides, among other things:

> (B)ut in prosecutions for rape, adultery, fornication, sodomy or the crime against nature the court may, in its discretion, exclude from the courtroom all persons except such as are necessary in the conduct of the trial.

In urging reversal upon the ground that this action of the court denied him a public trial, appellant relies principally upon *Re Oliver,* 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948), as interpreted by *Lewis* v. *Peyton,* 352 F. 2d 791 (4th Cir. 1965). Appellant contends that in the latter case, the Circuit Court of Appeals for the Fourth Circuit held that the due process clause of the Fourteenth Amendment to the Constitution of the United States embraced the Sixth Amendment, and guarantees a public trial. He argues that the action of the trial court, in excluding the public

during the testimony of the victim, was a violation of appellant's right to the public trial so guaranteed.

In *Lewis,* the prosecutrix was, as here, an eighty-seven year old woman. However, unlike the case here, she was bedridden at the time of the trial.

In *Lewis,* the Court of Appeals for the Fourth Circuit set aside the Virginia conviction upon two grounds. First, the entire court and court attendants moved to the bedroom of the prosecutrix in her home in a sparsely settled rural area for the purpose of taking her testimony, and her neighbors were ordered from the courtroom in order to make space in the tiny bedroom for the court officials. Not only were the neighbors excluded during the prosecutrix' testimony, but they were also excluded during the testimony of the only other person who testified in the case. Secondly, the court pointed out that these proceedings had been had without a prior order of record by the trial court as required by a Virginia statute permitting the taking of the deposition of the prosecutrix in a rape case, in the discretion of the court, by court order, without the usual formalities. The court pointed out that no such order had been entered in the case, and said, "(W)e cannot accept the belated contention that the conduct here indulged was a harmless substitute for that procedure." 352 F. 2d at 791.

Other cases cited by appellant deal with the exclusion of the general public throughout the entire trial.

The appellant concedes that the exclusion of the public by the trial court during the testimony of the prosecutrix in a rape case has been upheld against constitutional challenge where she was a young child. Geise v. United States, 262 F. 2d 151 (9th Cir. 1958), cert. denied, 361 U.S. 842 (1959), discussing earlier decisions; Harris v. Stephens, 361 F. 2d 888 (8th Cir. 1966); Hogan v. State, 191 Ark. 437, 86 S.W. 2d 931 (1935).

We have concluded that the same reasoning applies with equal or perhaps greater cogency in the case of this eighty-seven year old woman. The exclusion of the public during the course of her testimony, in order that she might not be required to undergo the humiliating and traumatic experiences of being compelled to relate in public, and be cross-examined about, the sordid details of the attack upon her, was a reasonable exercise of sound judicial discretion on the part of the trial judge. The consequences to the young

witness, supported by the resilience of youth, would be less grave than to one who is suffering the inevitable infirmities and frailties of great age.

We are unable to say in this case that the trial court abused its discretion or prejudiced appellant's rights in excluding the public while the prosecutirix testified. This view is strengthened by the failure of appellant to assign, in his motion for a new trial, this action of the trial court or any ground or prejudice resulting therefrom.

Appellant next contends that the admission of evidence regarding his fingerprints was prejudicial error, arguing that his prints were taken while he was illegally under arrest and did not have the benefit of the advice of counsel.

The police had reached the scene within a short time after the assault. They found a window screen removed from a window opening onto the front porch of the home, and the window raised about half-way. Within minutes, they dusted the window and window sill and lifted palm and fingerprints. The fingerprints were found on the outside of the window and the palm print was found inside, on the sill. The uncontradicted testimony was that this screen had not been off the window for more than a year. The prints found on the outside of the window necessarily would have been between the window and window screen, had the screen been in place. The palm print was inside, on the sill.

The victim had been hospitalized, and was suffering from shock, abrasions and contusions about the face and head, and was in a condition of extreme nervousness. However, she was able to tell the officers that her assailant had been a negro youth, and to give them a description. She did not make a positive identification of appellant at that time, but appellant fulfilled the general characteristics of the person described.

Beginning on December 3, the day following the crime, and continuing until appellant was arrested and charged, the Meridian police interrogated sixty-five or seventy negro youths, including appellant. An officer testified that he "arrested" appellant on December 3, and took him to police headquarters for interrogation. However, the record indicates that appellant was not arrested nor deprived of his liberty nor charged with any offense, but returned to his home following routine questioning and fingerprinting.

In the interim between the commission of the crime and

December 12, officers questioned appellant several times, sometimes at his home, sometimes in a car, and sometimes at city hall. Throughout this same period they also questioned many others. He was not placed in jail or charged with any offense, and a substantial portion of the interrogation dealt with an effort on the part of the officers to gain information as to others who might have committed the crime. However, on December 12, appellant actually was arrested, brought to Jackson and subjected to a lie detector test. Apparently it was at this time that he made a "statement" to police, but this statement was not used in evidence and does not appear in the record. Appellant's complaint that he was denied counsel in this connection is without merit. The nature of the statement does not appear, and in any event, it was not used against him.

> Pretrial interrogation of a criminal suspect by police, without warning him of his constitutional right to remain silent, and without granting his request for counsel, does not constitute prejudicial error, in the absence of proof that a confession, admission, or statement obtained from the defendant as a result of such interrogation was used in the evidence at the trial. State v. Silvacarvalho, 145 N.W. 2d 447, 449 (Neb. 1966), followed in State v. Levell, 149 N.W. 2d 46 (Neb. 1967); State v. Hizel, 150 N.W. 2d 217 (Neb. 1967). See also to the same effect: Knowles v. State, 194 So. 2d 562, 564 (Ala. 1967); People v. Succop, 57 Cal. Rptr. 269 (Calif. 1967); State v. Corrigan, 228 Atl. 2d 568 (Conn. 1967); State v. Hellér, 228 Atl. 2d 815, 821 (Conn. 1966); State v. Wessling, 150 N.W. 2d 301 (Iowa 1967); Cox v. Commonwealth, 411 S.W. 2d 320 (Ky. 1967); Ross v. Warden, 227 Atl. 2d 42, 45 (Md. 1967).

Appellant's fingerprints, together with the fingerprints of twenty-three others, whose prints had also been taken during the investigation, with the prints lifted from the window and window sill, were forwarded to the Federal Bureau of Investigation in Washington for study and comparison. The Federal Bureau of Investigation positively identified the fingerprints and palm prints on the window and window sill as being those of appellant. Appellant contends that his prints were taken while he was illegally under arrest and without benefit of counsel, and that this

violated his rights under the Fourth and Fourteenth Amendments to the United States Constitution and rendered inadmissible all evidence relating to them.

It is argued that *Bynum* v. *United States,* 262 F. 2d 465 (D.C. Cir. 1958), is directly in point. But in *Bynum,* the fingerprints were taken during an interrogation at police headquarters after Bynum had been illegally arrested and booked for the crime with which he was charged. The evidence condemned in *Bynum* was that "which the public authorities have caused an arrested person to yield to them during illegal detention."

Here appellant was not illegally detained. The argument that he had been illegally "arrested" is based upon the use of that word by an officer in describing what he did. The question as to whether an arrest has been made or not is to be determined from a consideration of what actually occurred. The statement that the appellee was "arrested" must yield to undisputed evidence of facts and circumstances showing that he was not.

In *Reed* v. *State,* 199 So. 2d 803 (Miss. 1967), this Court held that an arrest had taken place although the officers involved did not so state. The converse is true here. The officer said that he "arrested" appellant but the evidence, which is in no way controverted, shows that appellant was merely escorted to headquarters for interrogation, as in fact, were numerous others, in the course of an investigation by police of an unsolved major crime. It is clear from the record that there was no intention to arrest within the accepted legal meaning of the word.

In *Fondren* v. *State,* 253 Miss. 241, 259, 175 So. 2d 628, 636 (1965), this Court said:

> The mere fact that these officers talked to accused in police headquarters before he was identified and taken to jail does not establish that defendant was under arrest at the time.

Moreover, fingerprints fall into an entirely different category from testimonial communications obtained under interrogation. The privilege against self-incrimination under the Fifth and Fourteenth Amendments to the Constitution of the United States does not operate to proscribe what was done here.

In *Schmerber* v. *California,* 384 U.S. 757, 86 S. Ct. 1826,

16 L. Ed. 2d 908 (1966), the United States Supreme Court recognized this distinction and appended a footnote referring to the cases on the subject.

The case was in the investigatory stage, as distinguished from the accusatory stage. Escobedo v. Illinois, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). It is distinguished from *Escobedo* in that here there was underway "a general inquiry into an unsolved crime."

In *Culombe* v. *Connecticut*, 367 U.S. 568, 635, 81 S. Ct. 1860, 1896, 6 L. Ed. 2d 1037, 1076 (1961), the Court said:

> (O)ften there is little else the police can do than interrogate suspects as an indispensable part of criminal investigation.

In *Spano* v. *New York*, 360 U.S. 315, 327, 79 S. Ct. 1202, 1209, 3 L. Ed. 2d 1265, 1274 (1959), it is interesting to note this language of Justices Stewart, Douglas and Brennan, in a separate opinion: "Let it be emphasized at the outset that this is not a case where the police were questioning a suspect in the course of investigating an unsolved crime."

The case of *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), is possible the most restrictive of the recent decisions of the United States Supreme Court of the efforts of police officers to investigate crime. In that case, the Court said:

> Our decision is not intended to hamper the traditional function of police officers in investigating crime. See Escobedo v. Illinois, (citation omitted). When an individual is in custody on probable cause, the police may, of course, seek out evidence in the field to be used at trial against him. Such investigation may include inquiry of persons not under restraint. General on-the-scene questioning as to facts surrounding a crime *or other general questioning of citizens in the fact-finding process is not affected by our holding.* It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present. (emphasis added). 384 U.S. 477, 478, 86 S. Ct. 1629, 1630, 16 L. Ed. 2d 725, 726.

In *United States* v. *Kelly*, 55 F. 2d 67 (2nd Cir. 1932), it was said:

> Any restraint of the person may be burdensome. But some burdens must be borne for the good of the community (citations omitted). The slight interference with the person involved in finger printing seems to us one which must be borne in the common interest. 55 F. 2d at 68.

And further in *Kelly*, "We prefer, however, to rest our decision upon the general right of the authorities charged with the enforcement of the criminal law to employ finger printing as an appropriate means to identify criminals and detect crime." (Emphasis added). 55 F. 2d at 70.

In *Hutcherson* v. *United States*, 351 F. 2d 748, 122 App. D.C. 51 (D.C. Cir. 1965), a policeman had been escorted to police headquarters by an officer for the purpose of interrogation regarding conduct which subsequently led to his indictment for bribery. It was held that this amounted to an investigatory session and that the conduct of the policeman's superiors in thus pursuing inquiries fell short of an "arrest." *See also* Evans v. United States, 377 F. 2d 535 (5th Cir. 1967).

We are unwilling to impose further restrictions upon the efforts of the police in the detection and punishment of criminals. The use of fingerprinting has long been recognized as a scientific or exact method of identification. It is as valuable in clearing the innocent as it is in bringing his crime home to the guilty. Witness the fact in this case that, of the twenty-four persons whose prints were forwarded to the Federal Bureau of Investigation, twenty-three were at once freed of all suspicion and only one, the appellant, was incriminated by the unalterable evidence of his fingerprints.

If the police, as representatives of organized society, are to be deprived of every effective means of protecting the community against the modern day criminal, nothing will remain for the citizen, save to convert his home into a fortress, and to go armed for his own and his family's protection.

In the case here, nothing the police did or could ever do would alter in the slightest degree the configuration of appellant's fingerprints, nor cause them to be other than peculiar to himself, and different from those of all others.

The act of taking fingerprints is quite different in its essential nature from the obtaining of a confession, the authenticity of which becomes suspect by reason of coercion, real or supposed, to which the suspect may be subjected while under the constraint of an illegal arrest. We think the evidence of appellant's prints was properly admitted.

Closely allied to the proposition concerning the prints is appellant's contention that his rights under the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution were violated by failure to provide counsel. If appellant was entitled to counsel during the investigatory phase of the proceedings, so were sixty-five or seventy others who were questioned by officers. The complaint seems hypercritical since no attempt was made by the prosecution to use in evidence the confession or admission, or indeed a statement of any kind extracted from appellant after his arrest. Neither the result of the lie detector test nor the signed statement, to which counsel for appellant allude in their brief and which they seem to suggest was a confession of guilt, was offered in evidence, and, in fact neither of these appears in the record at all. The argument on the point is based upon the response of the prosecutrix to a question propounded to her on cross-examination, and quoted in the brief, that "he confessed it all." In the context of her answer, the statement was enigmatic and it was not made clear that she referred to appellant, as her answer dealt only with the fact that, after the attack, she had first tried to telephone one of her sons, and, failing to get him, called another. There was no mention of the appellant in the question nor in her answer.

However, we will assume that the jury could infer that she meant the appellant when she concluded her answer by saying "he confessed it all." Nevertheless, although unresponsive to the question propounded to her by counsel, the statement having been made, counsel for appellant ignored it. There was no objection, no motion to exclude, no request that the jury be instructed not to consider it and no motion was made for a mistrial. Moreover, it is significant that appellant did not assign this as a ground in his motion for a new trial.

It is noteworthy that this same response was later again elicited by counsel in their searching cross-examination of

the witness; it is not referred to in the brief, nor argued as error. As before, there was no objection, no motion to exclude and no request that the jury be instructed not to consider it. But the court, of its own motion, intervened and instructed the jury that the statement of the witness was not to be considered. It must be assumed that this action on the part of the court satisfied counsel, as they made no request for further instruction to the jury and did not move for a mistrial. These contemporaneous steps are indispensible under the circumstances shown by the record and reversible error cannot be predicated upon the failure of the trial court to do that which was not even requested. Henry v. State, 253 Miss. 263, 154 So. 2d 289 (1963), Vacated 379 U.S. 443, 85 S. Ct. 564, 13 L. Ed. 2d 408 (1965), Rehearing denied, 380 U.S. 926, 85 S. Ct. 878, 13 L. Ed. 2d 813 (1965), on remand, 253 Miss. 263, 174 So. 2d 348 (1965), Motion denied, 381 U.S. 908, 85 S. Ct. 1528, 14 L. Ed. 2d 431 (1965). "It, therefore, appears that the appellant who brought out this testimony on cross-examination and did not then object thereto is not in position to ask for reversal of the case on account thereof, if incompetent." Craft v. State, 202 Miss. 51, 57, 30 So. 2d 507, 508 (1947). To the same effect are Stone v. State, 210 Miss. 218, 49 So. 2d 263 (1950), and Lee v. State, 207 Miss. 96, 39 So. 2d 868 (1949), appeal dismissed, cert. denied, 338 U.S. 903, 70 S. Ct. 64, 94 L. Ed. 486 (1949).

Finally, appellant asserts that Mississippi Code 1942 An notated section 7185.15 (Supp. 1966), dealing with offenses by minors over thirteen years of age, violates the Fourteenth Amendment of the United States Constitution in that it provides that the circuit court shall have exclusive jurisdiction of such offenders who are charged with capital crimes.

In support of this argument counsel asserts that appellant, on the date of the crime, was fourteen years of age, and was fifteen years old at the time of his trial. These statements are outside the record as the age of the appellant is nowhere established by evidence or otherise.

The Youth Court Act, providing for certain exceptions to the criminal jurisdiction of the circuit court, under circumstances specified in the act, was not extended by the legislature to the capital crimes, murder and rape. The law

is uniform in its application to non-adults who are charged with either of those crimes. There is no irrational disparity in the treatment of offenders as was found in *Skinner* v. *Oklahoma*, 316 U.S. 535, 62 S. Ct. 488, 86 L. Ed. 1193 (1942). *See Bullock* v. *Harpole*, 233 Miss. 486, 102 So. 2d 687 (1958).

There was sufficient evidence to establish appellant's guilt. The testimony of the witnesses offered to establish an alibi was contradictory and so generally unsatisfactory that the jury was not required to accept it. We have concluded that the verdict of the jury was fully warranted by the evidence and that appellant's conviction was not the result of a deprivation of any constitutional right.

Affirmed.

GILLESPIE, P.J., and JONES, INZER and ROBERTSON, J.J., CONCUR.

Monday, November 6, 1967

44,501

JOHN DAVIS,

vs.

STATE

This cause having been submitted at a former day of this Term on the record herein from the Circuit Court of Lauderdale County and this Court having sufficiently examined and considered the same and being of the opinion that there is no error therein doth order and adjudge that the judgment of said Circuit Court rendered in this case on the 22nd day of November 1966—a conviction of rape and a sentence to serve a Term of LIFE in the State Penitentiary—be and the same is hereby affirmed. It is further ordered and adjudged that the County of Lauderdale do pay the costs of this appeal to be taxed.

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IN THE SUPREME COURT OF MISSISSIPPI

No. 44,501

JOHN DAVIS, Appellant,

v.

STATE OF MISSISSIPPI, Apellee.

SUGGESTION OF ERROR—Filed November 21, 1967

Comes now John Davis, by his counsel, and respectfully suggests that this Honorable Court erred in its decision in this case delivered on Nov. 6, 1967, in the following respects:

I

The Court's statement of the facts is not supported by the record and appellant's conviction rests on no evidence and denies him due process of law.

II

The Court has not properly distinguished the exclusion of the public from the Courtroom during the testimony of an eighty-seven year old woman from testimony given by a child, and appellant was denied his right to a public trial in violation of the United States Constitution.

III

The Court too narrowly construes the nature of an "arrest" and does not take notice of the fact that the fingerprints forwarded to the FBI and introduced at trial were those of appellant taken on the 14th of December at which time he was in the Lauderdale County Jail, and admission into evidence of appellant's fingerprints obtained during the unlawful detention violated the Fourth and Fourteenth Amendments to the United States Constitution.

IV

The random detentions of appellant between December 3rd and December 12th constituted arrests and at every

stage of the criminal proceedings against appellant the State relied upon information gained from these unlawful arrests designed to incriminate appellant in the absence of counsel, in violation of the Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted, /s/ Jack H. Young, 115½ North Farish Street, Jackson, Mississippi 39201. Marian E. Wright, Paul Brest, 538½ North Farish Street, Jackson, Mississippi 39202. Jack Greenberg, James M. Nabrit, III, Suite 2030, Ten Columbus Circle, New York, New York 10019. Attorneys for Appellant

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Certificate of Service (omitted in printing.)

Monday, December 11, 1967, Court Sitting:

44,501

JOHN DAVIS,

vs.

STATE

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled doth order and adjudge that said suggestion of error be and the same is hereby overruled.

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Clerk's certificate (omitted in printing.)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1968

No. 60 Misc.

JOHN DAVIS, Petitioner,

v.

MISSISSIPPI

On petition for writ of Certiorari to the Supreme Court of the State of Mississippi.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted, limited to the first question presented by the petition which reads as follows:

"Whether the introduction into evidence at petitioner's criminal trial of his fingerprints, taken as a result of petitioner's illegal arrest, violated petitioner's rights under the Fourth and Fourteenth Amendments?"

The case is transferred to the appellate docket as No. 645 and placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

October 14, 1968.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1968—326-773/342